

EXHIBIT C

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NEW BAY CAPITAL, LLC,
Petitioner,
v.
VIRENTX INC.,
Patent Owner.

Case IPR2013-00375
Patent 6,502,135

NEW BAY CAPITAL, LLC,
Petitioner,
v.
VIRENTX INC.,
Patent Owner.

Case IPR2013-00376
Patent 7,490,151

NEW BAY CAPITAL, LLC,
Petitioner,
v.
VIRENTX INC.,
Patent Owner.

Case IPR2013-00377
Patent 7,418,504

NEW BAY CAPITAL, LLC,
Petitioner,
v.
VIRENTX INC.,
Patent Owner.

Case IPR2013-00378
Patent 7,921,211

Tuesday, October 29, 2013

3:00 p.m. EST

Teleconference before the Honorable Sally C.

Medley, the proceedings being recorded stenographically
by Jonathan Wonnell, a Registered Professional Court
Reporter (NCRA #835577) and Notary Public of the State
of Minnesota, and transcribed under his direction.

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A298

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

2

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2 (All participants appearing by phone)

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Teleconference October 29, 2013

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1 A P P E A R A N C E S (Cont'd)

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Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

4

1 A P P E A R A N C E S (Cont'd)

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Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

5

1 P R O C E E D I N G S

2 (2:00 p.m.)

3 JUDGE MEDLEY: Good afternoon. This is
4 Judge Medley. I have with me on the line Judges
5 Easthom and Siu. This is in regards to
6 IPR2013-00375, 376, 377 and 378. Do I have a court
7 reporter on line?

8 THE REPORTER: Yes, Judge. This is Jon
9 Wonnell. I'll put myself on mute.

10 JUDGE MEDLEY: All right. Court
11 reporter. Great. So we can go ahead and begin.
12 And I'd like to take a roll call. For Apple?

13 MR. KUSHAN: Jeff Kushan from Sidley
14 Austin with Joe Micallef.

15 MS. YOKOYAMA: Jennifer Yokoyama with
16 Apple.

17 MR. MELAUGH: David Melaugh with Apple.

18 JUDGE MEDLEY: Okay. And Jennifer and
19 David, you're not counsel of record?

20 MR. MELAUGH: I am in-house counsel with
21 Apple.

22 MS. YOKOYAMA: As am I.

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A302

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

6

1 JUDGE MEDLEY: Okay. And then for New
2 Bay?

3 MR. ASHER: Robert Asher from Sunstein,
4 Kann, Murphy & Timbers.

5 JUDGE MEDLEY: Thank you. And do you
6 have anyone else with you?

7 MR. ASHER: Just myself.

8 JUDGE MEDLEY: Okay. And then Virnetx?

9 MR. PALYS: Hi, Your Honor. This is
10 Joseph Palys. And with me is Naveen Modi, both
11 from Finnegan Henderson.

12 JUDGE MEDLEY: All right. Thank you.
13 The panel understands that New Bay would like to
14 file a motion to terminate the four proceedings and
15 that the request is also not based on a settlement
16 agreement. So we'd like to begin the conference
17 call letting counsel for New Bay explain the
18 situation.

19 MR. ASHER: Yes, Your Honor. Actually
20 at this point this would be a joint motion to
21 terminate in which both parties, Virnetx and New
22 Bay, join in this request to terminate the IPRs.

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

7

1 The parties no longer wish to contest this
2 proceeding and we expect that the normal course
3 where there are no parties with anything to
4 contest, that the inter partes review should be
5 terminated typically pursuant to the statute 35
6 U.S.C. 317.

7 JUDGE MEDLEY: But that has to do with
8 settlement and you've represented that there is no
9 settlement.

10 MR. ASHER: There is no settlement other
11 than the fact that we indicated our interest in
12 filing a motion to terminate and Virnetx is in
13 agreement with that.

14 JUDGE MEDLEY: Okay. So I don't think
15 that 317 is the proper statute for this situation
16 because under that particular statute, at the top
17 it's entitled settlement and then there's
18 agreements in writing. If there are agreements,
19 you know, you have to file a true copy if you have
20 an agreement.

21 So in a situation where you don't have
22 an agreement or a settlement it doesn't seem to

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

8

1 really fit within the purviews of that.

2 MR. ASHER: Well, it's not clear to me
3 how a settlement is construed. We have the e-mail
4 that we sent and the e-mail that Virnetx sent
5 agreeing to termination.

6 JUDGE MEDLEY: Mm-hmm.

7 MR. ASHER: So --

8 JUDGE MEDLEY: I mean, to back up, we
9 originally understood that Petitioner wanted to
10 terminate and that properly could be construed as a
11 request to adverse judgment under 42.73 in which
12 the Board would enter judgment because you are
13 abandoning the contest.

14 And we don't have a settlement here. So
15 it doesn't seem like that would be the appropriate
16 way to go under 317, to terminate. So if we
17 authorized a motion to -- for you to file a motion
18 to terminate, it seems like that is what you would
19 be requesting, unless I'm -- I mean, you're
20 abandoning the contest, correct?

21 MR. ASHER: Correct. I'm not -- not
22 having seen prior cases and seeing anything in the

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

9

1 statute, it's not clear to us what the effect of an
2 adverse judgment would be.

3 JUDGE MEDLEY: Well, we were thinking
4 that under 325(d), if you were to come back before
5 us, that we likely would not institute -- I mean,
6 we wouldn't go forward on another petition. That
7 is, if you drop this abandonment and then try to
8 come back in, I think we'd have a pretty good leg
9 to stand on under 325(d).

10 And in particular, it says "In
11 determining whether to institute order proceeding
12 under this chapter, chapter 30, or chapter 31, the
13 director may take into account whether, and reject
14 the petitioner request because, the same or
15 substantially the same prior art or arguments
16 previously were presented to the Office."

17 So in effect there's no estoppel, Rule
18 42.73(b) estoppel, because there is not going to be
19 a final determination. However, we feel like that
20 the likely scenario would be there would be a
21 352(b) estoppel.

22 MR. ASHER: Yeah. So the estoppel

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

10

1 exists in the Patent Office but there's no final
2 decision. So that Statute 315 does not apply?

3 JUDGE MEDLEY: I think that's with
4 respect to final determination, if I'm not
5 mistaken. 315?

6 MR. ASHER: Yeah. 315(e) relates to a
7 final written decision.

8 JUDGE MEDLEY: That's correct. That's
9 the way I read that too.

10 MR. ASHER: Right.

11 JUDGE MEDLEY: But I think that that's
12 why 325(d) would be -- that would be the concern, I
13 guess, to New Bay. So in other words if you want
14 out -- we understand that if you want out you want
15 out. You abandon the contest. Then if you tried
16 to come back in, you know, I think you're going to
17 be out of luck, unless I'm --

18 MR. ASHER: We're fine with that as long
19 as there's no final written decision that arises
20 out of these four IPRs.

21 JUDGE MEDLEY: Okay. All right. So I
22 then -- I don't know that we need a joint motion.

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

11

1 It could just be an unopposed motion.

2 MR. KUSHAN: Well -- excuse me, Your
3 Honor. This is Jeff Kushan. We would oppose that
4 motion and we're ready to give you the reasons we
5 have for opposing it.

6 JUDGE MEDLEY: Okay. Right. I'm just
7 trying to work between the two parties that are the
8 parties in this case.

9 So if that sounds agreeable to New Bay
10 we would -- we would probably authorize motion to
11 terminate and then you would just file it and say
12 it's unopposed. You would, you know, follow 42.73
13 requesting adverse judgment, so abandonment of the
14 contest. Then we would enter judgment and we would
15 cite to 325(d).

16 MR. ASHER: Okay.

17 JUDGE MEDLEY: All right. Okay. Before
18 I move on to hear from Mr. Kushan, does Mr. Palys
19 want to chime in?

20 MR. PALYS: Thank you, Your Honor. Yes,
21 this is Joe Palys for Virnetx. Obviously we don't
22 object. We wouldn't oppose that motion. So from

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

12

1 that standpoint there's nothing more to say from
2 Virnetx's side.

3 But I do -- since I've already got the
4 floor I was wondering if I could address what it
5 appears that Apple is going to be voicing in
6 opposition.

7 JUDGE MEDLEY: Well, let's hear from
8 them first. Okay?

9 MR. PALYS: Okay. I'll reserve time.
10 Thank you.

11 JUDGE MEDLEY: Apple?

12 MR. KUSHAN: Sure, Your Honor. We've
13 looked at every termination decision that has come
14 out of the Board, both before institution and trial
15 and after institution and trial. One thing that we
16 keep seeing is one of the primary determinations in
17 whether to grant that motion is whether there is
18 concurrent litigation involving the same patent.

19 And what we see consistently being
20 stated by the panels in these decisions is that the
21 absence -- there's an absence of concurrent
22 litigation involving the contested patents and that

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

13

1 is a factor supporting termination. And we take
2 from that the view that if there is concurrent
3 litigation involving the same patent then that is a
4 factor that should be considered against granting a
5 motion to terminate.

6 JUDGE MEDLEY: But New Bay is not a
7 party to the litigation. Is that correct?

8 MR. KUSHAN: That's right. But when we
9 look at these decisions they don't limit the focus
10 to the parties in the IPR. They look at other
11 parties, third parties, against whom the patent has
12 been asserted. And we believe in this instance
13 there are a number of very good reasons, public
14 policy reasons, why you should defer terminating
15 the proceeding as to New Bay.

16 As you'll recall, you authorized a
17 briefing of a joinder motion for Apple's petitions
18 relative to the petitions that have been filed by
19 New Bay.

20 JUDGE MEDLEY: Right.

21 MR. KUSHAN: That briefing is complete,
22 as is the briefing -- the patenter has filed

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

14

1 oppositions, their opening statements, their
2 openings responses, in all of the petitions that
3 have been filed both from New Bay and Apple. And
4 so the record is pretty much complete right now
5 waiting for the Board to act on all these petitions
6 and the joinder motion.

7 Our view is that you should defer
8 termination of the proceeding as to New Bay until
9 after you decided whether to institute the
10 proceeding and decide the joinder motion. We've
11 all invested a fair amount of effort to bring the
12 issues for joinder, and we believe that the
13 proceeding is certainly warranted based on the
14 merits of the claims and the status of those claims
15 and concurrent Office proceedings. Both -- each of
16 those claims and each of the patents has been held
17 unpatentable at this point.

18 So in our view the filing of a motion to
19 terminate at this point in the proceedings is
20 premature and would be a waste of time for
21 everybody. We believe that the ultimate outcome of
22 the proceedings, both from the basis of the Apple

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

15

1 petitions or from the basis of the New Bay
2 petitions, is something that should be taken up and
3 conducted in an IPR. And through the joinder
4 motion hopefully you would grant the motion to join
5 these proceedings.

6 One thing as well I just wanted to make
7 clear is that we would -- while we would oppose the
8 termination at this point before you've had a
9 chance to consider the joinder motion and make a
10 determination on that, we would not oppose New Bay
11 being terminated in the proceeding if you were to
12 institute trial. And from that perspective we
13 believe it's somewhat efficient for you to defer
14 the question of whether it's appropriate to
15 terminate or not.

16 I want to make sure you're also aware
17 that -- and we've done -- in our periodic updates
18 there's an appeal proceeding underway out of a
19 district court action in Texas. Virnetx had filed
20 two actions under these patents against Apple and a
21 number of other parties. The first trial ended and
22 that decision, which was adverse to Apple, is on

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

16

1 appeal at the federal circuit. We've just filed an
2 opening appeal brief about a week and a half ago.

3 JUDGE MEDLEY: Mm-hmm.

4 MR. KUSHAN: We want to flag that
5 because in the event that that appeal proceeding
6 does not reverse the judgment of the district court
7 in Texas, then some of the claims that have
8 presently been found unpatentable by the Office in
9 their inter partes reexamination proceedings may
10 not be continued in the PTO proceedings.

11 So there's at least some claims that are
12 currently found to be unpatentable in the PTO in
13 inter partes review, inter partes reexamination,
14 which may not get to an ultimate outcome because of
15 the estoppel provisions of the old law. And so
16 there is a public policy reason for the Office to
17 continue its conducting of an evaluation of the
18 patentability of at least some of these claims in
19 our view. That wouldn't be a factor we think as
20 relevant to continuing an IPR on the basis of these
21 proceedings.

22 So to wrap up, we look at this situation

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

17

1 as something where if the panel were to consider
2 and act on the petitions that have been filed and
3 on the joinder motion briefed and were to decide to
4 institute trial, we would not oppose at that point
5 the withdrawal of New Bay from these proceedings
6 and that would in one sense obviate the need for
7 any briefing or discussion of the motion to
8 terminate with regard to them.

9 JUDGE MEDLEY: Okay. This question for
10 you: How does it become proper, then, if we were
11 to go forward, join the cases, and then let them
12 out? How is it proper at that point for them to
13 come out of the cases when prior to it would be
14 improper because of the ongoing litigation?

15 MR. KUSHAN: Well, the question I think
16 that's uncertain at this point is the status of
17 Apple's petitions under the section 315 of --
18 315(b). And we know that there have been a couple
19 decisions of panels looking at situations where a
20 party has been sued more than one year prior to the
21 institution or its filing of a petition.

22 Our case involves a somewhat different

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

18

1 situation. We have been sued twice by Virnetx and
2 we're within the second window of that litigation.
3 So, you know, in one sense if the Board were to
4 find that the first institute, the first trial, the
5 first action, set the clock and is not reset by the
6 second action Virnetx has filed, then there may be
7 a scenario where we would not be able to
8 participate in an IPR in this case absent the
9 joinder of our proceeding to the proceedings -- the
10 petitions that have been filed by New Bay.

11 So in this instance there is a
12 consequence of the timing of the termination
13 decision by the panel that may arise. And then
14 again, we're somewhat in uncertain status right
15 now. We don't know exactly how you would act on or
16 consider the question of 315(b) relative to the
17 Apple petitions. But --

18 JUDGE MEDLEY: Okay. Okay. I think I
19 understand. I just thought -- at first you had
20 said that the Board had come out with some decision
21 saying that we wouldn't terminate a proceeding if
22 there was ongoing litigation between the parties or

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

19

1 something to that effect.

2 MR. KUSHAN: Yes. And --

3 JUDGE MEDLEY: And we all recognize that
4 New Bay is not part of the litigation. But then
5 you said it didn't matter, that any third party,
6 that that would be applicable.

7 And so I'm just trying to clarify. You
8 said that that should prevent us from going forward
9 with the termination, but after we were to
10 institute then it would be okay. So I was just
11 trying to clarify if it was okay if we were to join
12 the cases.

13 MR. KUSHAN: Sure. Well, let me try to
14 make this very clear. I think the statute is very
15 clear that you would be able to institute trial on
16 the basis of the Apple petitions when they're
17 accompanied by a joinder motion. And the joinder
18 motion would be authorized, is connected to the New
19 Bay petitions.

20 So if you were to institute trial on the
21 basis of the Apple and New Bay petitions there's no
22 question you're entitled to conduct trial once

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

20

1 that's been determined.

2 What we've seen in all the termination
3 decisions that have come out of the panel is that
4 the panel will weigh as a factor whether to grant
5 termination the existence against any party of
6 litigation involving the same patent. In fact that
7 seems to be the only criteria that seems to be
8 consistently identified in justifying termination.

9 So those are two separate --

10 JUDGE MEDLEY: But that is a post
11 institution, right? That's not a factor that we
12 weigh necessarily before we institute?

13 MR. KUSHAN: No. It's been in a number
14 of pre-institution cases as well. I can give you a
15 couple of the orders.

16 JUDGE MEDLEY: No. That's okay. I
17 think we can find them if they're out there.

18 MR. KUSHAN: There's about a half a
19 dozen of them.

20 JUDGE MEDLEY: Okay. Thank you very
21 much. And now I'd like to hear from New Bay.

22 MR. ASHER: Firstly, Your Honor, we

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

21

1 don't see how Apple has standing to present
2 arguments or take a position in these IPRs at all.
3 The joinder is not timely. The IPRs have not been
4 instituted. And so we don't see how Apple has any
5 standing at all.

6 Secondly, if you are going to consider
7 concurrent litigation, please understand that New
8 Bay has been subjected to seven subpoenas. I've
9 been subpoenaed. My partner has been subpoenaed.
10 My firm has been subpoenaed. We've been subjected
11 with over 300 document requests, 300 documents for
12 deposition. There have been briefs filed in
13 Massachusetts, Delaware and Florida to quash these
14 discovery requests from Virnetx.

15 It is New Bay's interest in bringing
16 this all to an end and taking the relevance of
17 these proceedings totally off the board as soon as
18 possible so that it does not have to incur these
19 continued gross legal expenditures to deal with all
20 the discovery requests that are out and ongoing.

21 So if the concurrent litigation is a
22 factor in your decision we think those things

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

22

1 should be taken into account so that the Board
2 would terminate this proceeding as soon as
3 possible.

4 JUDGE MEDLEY: Okay. Are you finished?

5 MR. ASHER: Yes.

6 JUDGE MEDLEY: All right. And then
7 counsel for Virnetx?

8 MR. PALYS: Thank you, Your Honor. Just
9 to address some of the points that Apple's counsel
10 has raised, just to begin with, you know, we kind
11 of agree with New Bay's counsel that we think --
12 Apple is not a party to these proceedings right now
13 and we think it would actually be against public
14 policy to allow an entity to interfere with the
15 joint requests of the only participants in this
16 proceedings, in this case New Bay and Virnetx,
17 willing to terminate these IPR proceedings.

18 And having said that, you know,
19 regarding the public policy, I think the Patent
20 Trial Office practice guides suggest that there is
21 strong public policy reasons to favor settlement
22 and thus termination between parties, especially if

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

23

1 there's a joint request to do that.

2 JUDGE MEDLEY: But there's no
3 settlement, so --

4 MR. PALYS: Well, we understand that,
5 but the point is that we think that -- if there is
6 a joint request between the parties to terminate
7 the proceedings, we think there is actually even
8 more strong public policy to do so if it's before
9 institution.

10 Again, the only two parties that are
11 really involved in these proceedings is New Bay and
12 Vernetx and both are willing to terminate the
13 proceedings and we think it actually helps the
14 public policy or supports this idea of favoring
15 settlement, if you will, or, if not, termination.

16 JUDGE MEDLEY: Okay.

17 MR. PALYS: Following along with --
18 about prejudice, Apple raised some issues on
19 prejudice. Just A couple points on this.

20 Apple, as you know, Your Honor, already
21 has -- I don't know. I think it's around eleven
22 inter partes reexams pending against Virnetx

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

24

1 patents. Some of those involve all four of the
2 patents at issue in the New Bay IPRs. The same
3 claims, the same patents and the same prior art.

4 So the fact that Apple not being able to
5 participate in the IPR, I think they have these
6 inter partes reexaminations. They're going to have
7 the same body review these eventually, which is the
8 PTAB, and they did it through appeal. So we think
9 they will have their day in court regarding
10 challenging the validity of the same patents here.

11 The second point is, you know, according
12 to Apple and in their petitions and even in their
13 motion to terminate, that they don't have a 315(b)
14 problem. I mean, when they filed their petitions
15 they specifically said their position was that
16 they're not time barred. Of course Virnetx
17 disagreed with that, but from Apple's perspective,
18 they don't need New Bay's petitions.

19 So they have their own -- I believe it's
20 seven IPRs pending right now. There would be no
21 prejudice, according to them, because under 315(b)
22 doesn't apply to their petition.

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

25

1 JUDGE MEDLEY: Okay. All right.

2 MR. PALYS: And one last point, Your
3 Honor. I'm sorry to interrupt. But just on the
4 idea of motion for joinder, I believe -- I'd like
5 just to point the Board to the decision by Judge
6 Lee in IPR 2013, 134. That's paper number 34. And
7 in there Judge Lee specifically points out that a
8 motion to joinder does not and should not act as an
9 automatic stay of the proceedings.

10 Facts very similar to what we're
11 addressing here. In this decision they were
12 addressing an adverse judgment request. And the --

13 JUDGE MEDLEY: Okay. I'm aware of that.

14 MR. PALYS: Thank you.

15 JUDGE MEDLEY: Okay. I think we have
16 enough information and we're going to confer so if
17 you'd please wait for us for a few minutes we will
18 get back on line.

19 (Pause, approximately 2 minutes.)

20 JUDGE MEDLEY: Okay. The panel is back.
21 And we're going to take it under advisement, all of
22 the arguments from today. When can we get a

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

26

1 transcript?

2 THE REPORTER: I have no problem getting
3 it to you tomorrow morning.

4 JUDGE MEDLEY: Okay. So if you could
5 file that tomorrow morning we should be able to
6 get an order out in the next day or two.

7 Okay. Are there any questions,
8 comments?

9 MR. KUSHAN: Yes, Your Honor. Just one
10 last thing. I wanted to -- I mean, if you would
11 like any updates on the status of these
12 proceedings, we've been filing them but there seems
13 to be some question based on Virnetx's comments
14 about which ones we've filed at Apple, what the
15 status of them are and other variables.

16 If that's relevant we're happy to
17 provide you with further information.

18 JUDGE MEDLEY: Okay. We'll let you
19 know. Any other questions, comments?

20 MR. PALYS: Not from Virnetx, Your
21 Honor.

22 MR. ASHER: No, thanks.

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

27

1 JUDGE MEDLEY: Okay. Thank you very
2 much.

3 MR. ASHER: Thanks.

4 MR. KUSHAN: Thank you.

5 JUDGE MEDLEY: Bye.

6 (Whereupon, the conference call ended at
7 3:27 p.m. EST.)

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Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

28

1 CERTIFICATE OF REPORTER

2 I, Jonathan Wonnell, a Registered
3 Professional Court Reporter (NCRA #835577) and
4 Notary Public of the State of Minnesota, County of
5 Hennepin, do hereby certify that the foregoing
6 transcript is a true and accurate record of these
7 proceedings; that said proceedings were taken in
8 Stenotype note by me on the 29th day of October,
9 2013, commencing at 3:00 p.m. EST and ending at
10 3:27 p.m. EST.

11 I further certify that present on behalf
12 of Party Virnetx were Joseph Palys, Esq., and
13 Naveen Modi, Esq., of Finnegan, Henderson, Farabow,
14 Garrett & Dunner, LLP; on behalf of Party New Bay
15 Capital was Robert M. Asher, Esq., of Sunstein,
16 Klann, Murphy & Timbers LLP; and on behalf of
17 Non-Party Apple Inc. were Jeffrey Kushan, Esq., and
18 Joseph A. Micallef, Esq., of Sidley Austin LLP, and
19 Apple Inc. in-house counsel Jennifer Yokoyama,
20 Esq., and David Melaugh, Esq.

21 I further certify that I am not related
22 to, nor associated with any of the parties or their
attorneys, nor do I have any disqualifying
interest, personal or financial, in the actions
within.

Dated this 29th day of October, 2013, in
Hennepin County, Minnesota.

Jonathan Wonnell
Notary Public, Hennepin County, Minnesota
My Commission expires January 31, 2017

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
 Teleconference October 29, 2013

1

A abandon 10:15 abandoning 8:13,20 abandonment 9:7 11:13 able 18:7 19:15 24:4 26:5 absence 12:21 12:21 absent 18:8 accompanied 19:17 account 9:13 22:1 accurate 28:4 act 14:5 17:2 18:15 25:8 action 15:19 18:5,6 actions 15:20 28:13 address 12:4 22:9 addressing 25:11,12 adverse 8:11 9:2 11:13 15:22 25:12 advisement 25:21 afternoon 5:3 ago 16:2 agree 22:11 agreeable 11:9 agreeing 8:5 agreement 6:16 7:13,20,22 agreements 7:18 7:18 ahead 5:11 allow 22:14	amount 14:11 appeal 1:2 2:3 15:18 16:1,2,5 24:8 appearing 2:1 appears 12:5 Apple 2:7,19 5:12,16,17,21 12:5,11 14:3 14:22 15:20,22 18:17 19:16,21 21:1,4 22:12 23:18,20 24:4 24:12 26:14 28:9,10 Apple's 13:17 17:17 22:9 24:17 applicable 19:6 apply 10:2 24:22 appropriate 8:15 15:14 approximately 25:19 arguments 9:15 21:2 25:22 arises 10:19 art 9:15 24:3 Asher 4:4 6:3,3 6:7,19 7:10 8:2 8:7,21 9:22 10:6,10,18 11:16 20:22 22:5 26:22 27:3 28:8 asserted 13:12 associated 28:12 attorneys 28:12 Austin 2:10 5:14 28:10 authorize 11:10	authorized 8:17 13:16 19:18 automatic 25:9 Avenue 3:16 aware 15:16 25:13 <hr/> B back 8:8 9:4,8 10:16 25:18,20 barred 24:16 based 6:15 14:13 26:13 basis 14:22 15:1 16:20 19:16,21 Bay 1:3,6,9,12 4:3 6:2,13,17 6:22 10:13 11:9 13:6,15 13:19 14:3,8 15:1,10 17:5 18:10 19:4,19 19:21 20:21 21:8 22:16 23:11 24:2 28:8 Bay's 21:15 22:11 24:18 behalf 2:7 3:3 4:3 28:6,8,9 believe 13:12 14:12,21 15:13 24:19 25:4 board 1:2 2:3 8:12 12:14 14:5 18:3,20 21:17 22:1 25:5 body 24:7 Boston 4:7 brief 16:2 briefed 17:3	briefing 13:17 13:21,22 17:7 briefs 21:12 bring 14:11 bringing 21:15 Brown 2:10 Bye 27:5 <hr/> C C 1:18 2:1,1,4 3:1 4:1 5:1 California 2:21 call 5:12 6:17 27:6 Capital 1:3,6,9 1:12 4:3 28:8 case 1:4,7,10,13 11:8 17:22 18:8 22:16 cases 8:22 17:11 17:13 19:12 20:14 certainly 14:13 CERTIFICA... 28:1 certify 28:3,6,11 challenging 24:10 chance 15:9 chapter 9:12,12 9:12 chime 11:19 circuit 16:1 cite 11:15 claims 14:14,14 14:16 16:7,11 16:18 24:3 clarify 19:7,11 clear 8:2 9:1 15:7 19:14,15 clock 18:5 come 9:4,8	10:16 12:13 17:13 18:20 20:3 commencing 28:5 comments 26:8 26:13,19 Commission 28:21 complete 13:21 14:4 Computers 2:7 concern 10:12 concurrent 12:18,21 13:2 14:15 21:7,21 conduct 19:22 conducted 15:3 conducting 16:17 confer 25:16 conference 6:16 27:6 connected 19:18 consequence 18:12 consider 15:9 17:1 18:16 21:6 considered 13:4 consistently 12:19 20:8 construed 8:3 8:10 Cont'd 3:1 4:1 contest 7:1,4 8:13,20 10:15 11:14 contested 12:22 continue 16:17 continued 16:10 21:19
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Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

2

continuing 16:20 copy 7:19 correct 8:20,21 10:8 13:7 counsel 5:19,20 6:17 22:7,9,11 28:10 County 28:3,14 28:20 couple 17:18 20:15 23:19 course 7:2 24:16 court 1:20 5:6 5:10 15:19 16:6 24:9 28:2 criteria 20:7 Cupertino 2:21 currently 16:12	deposition 21:12 determination 9:19 10:4 15:10 determinations 12:16 determined 20:1 determining 9:11 different 17:22 direction 1:22 director 9:13 disagreed 24:17 discovery 21:14 21:20 discussion 17:7 disqualifying 28:12 district 15:19 16:6 document 21:11 documents 21:11 dozen 20:19 Drive 3:8 drop 9:7 Dunner 3:6,15 28:8	27:6 enter 8:12 11:14 entitled 7:17 19:22 entity 22:14 especially 22:22 Esq 2:8,9,17,18 3:4,13 4:4 28:7 28:7,8,9,10,11 28:11 EST 1:17 27:7 28:5,6 estoppel 9:17,18 9:21,22 16:15 evaluation 16:17 event 16:5 eventually 24:7 everybody 14:21 exactly 18:15 excuse 11:2 existence 20:5 exists 10:1 expect 7:2 expenditures 21:19 expires 28:21 explain 6:17	favoring 23:14 federal 16:1 feel 9:19 file 6:14 7:19 8:17 11:11 26:5 filed 13:18,22 14:3 15:19 16:1 17:2 18:6 18:10 21:12 24:14 26:14 filing 7:12 14:18 17:21 26:12 final 9:19 10:1,4 10:7,19 financial 28:13 find 18:4 20:17 fine 10:18 finished 22:4 Finnegan 3:5,14 6:11 28:7 firm 21:10 first 12:8 15:21 18:4,4,5,19 Firstly 20:22 fit 8:1 flag 16:4 floor 12:4 Florida 21:13 focus 13:9 follow 11:12 Following 23:17 foregoing 28:3 forward 9:6 17:11 19:8 found 16:8,12 four 6:14 10:20 24:1 Freedom 3:7,8 further 26:17 28:6,11	G G 5:1 Garrett 3:5,14 28:8 getting 26:2 give 11:4 20:14 go 5:11 8:16 9:6 17:11 going 9:18 10:16 12:5 19:8 21:6 24:6 25:16,21 good 5:3 9:8 13:13 grant 12:17 15:4 20:4 granting 13:4 Great 5:11 gross 21:19 guess 10:13 guides 22:20
D D 2:4 5:1 D.C 2:12 3:17 Dated 28:14 David 2:18 5:17 5:19 28:11 day 24:9 26:6 28:5,14 deal 21:19 decide 14:10 17:3 decided 14:9 decision 10:2,7 10:19 12:13 15:22 18:13,20 21:22 25:5,11 decisions 12:20 13:9 17:19 20:3 defer 13:14 14:7 15:13 Delaware 21:13	E E 2:1,1,1,18 3:1 3:1,4 4:1,1 5:1 5:1 e-mail 8:3,4 Easthom 2:4 5:5 effect 9:1,17 19:1 efficient 15:13 effort 14:11 eleven 23:21 ended 15:21	F F 2:1 fact 7:11 20:6 24:4 factor 13:1,4 16:19 20:4,11 21:22 Facts 25:10 fair 14:11 Farabow 3:5,14 28:7 favor 22:21	H half 16:2 20:18 happy 26:16 hear 11:18 12:7 20:21 held 14:16 helps 23:13 Henderson 3:5 3:14 6:11 28:7 Hennepin 28:3 28:14,20 Hi 6:9 Honor 6:9,19 11:3,20 12:12 20:22 22:8 23:20 25:3 26:9,21 Honorable 1:18 2:4,4,5 hopefully 15:4	

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

A327

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

3

<p style="text-align: center;">I</p> <p>idea 23:14 25:4 identified 20:8 improper 17:14 in-house 5:20 28:10 incur 21:18 indicated 7:11 information 25:16 26:17 Inifinite 2:20 instance 13:12 18:11 institute 9:5,11 14:9 15:12 17:4 18:4 19:10,15,20 20:12 instituted 21:4 institution 12:14,15 17:21 20:11 23:9 inter 7:4 16:9,13 16:13 23:22 24:6 interest 7:11 21:15 28:13 interfere 22:14 interrupt 25:3 invested 14:11 involve 24:1 involved 23:11 involves 17:22 involving 12:18 12:22 13:3 20:6 IPR 13:10 15:3 16:20 18:8 22:17 24:5 25:6 IPR2013-00375 1:4 5:6</p>	<p>IPR2013-00376 1:7 IPR2013-00377 1:10 IPR2013-00378 1:13 IPRs 6:22 10:20 21:2,3 24:2,20 issue 24:2 issues 14:12 23:18</p> <p style="text-align: center;">J</p> <p>January 28:21 Jeff 5:13 11:3 Jeffrey 2:8 28:9 Jennifer 2:17 5:15,18 28:10 jkushan@sidl... 2:14 jmicallef@sid... 2:15 Joe 5:14 11:21 join 6:22 15:4 17:11 19:11 joinder 13:17 14:6,10,12 15:3,9 17:3 18:9 19:17,17 21:3 25:4,8 joint 6:20 10:22 22:15 23:1,6 Jon 5:8 Jonathan 1:20 28:2,19 Joseph 2:9 3:4 6:10 28:7,10 joseph.palys... 3:11 Judge 5:3,4,8,10 5:18 6:1,5,8,12 7:7,14 8:6,8</p>	<p>9:3 10:3,8,11 10:21 11:6,17 12:7,11 13:6 13:20 16:3 17:9 18:18 19:3 20:10,16 20:20 22:4,6 23:2,16 25:1,5 25:7,13,15,20 26:4,18 27:1,5</p> <p>Judges 5:4 judgment 8:11 8:12 9:2 11:13 11:14 16:6 25:12 justifying 20:8</p> <p style="text-align: center;">K</p> <p>K 2:11 Kann 4:5 6:4 KARL 2:4 keep 12:16 kind 22:10 Klann 28:9 know 7:19 10:16 10:22 11:12 17:18 18:3,15 22:10,18 23:20 23:21 24:11 26:19 Kushan 2:8 5:13 5:13 11:2,3,18 12:12 13:8,21 16:4 17:15 19:2,13 20:13 20:18 26:9 27:4 28:9</p> <p style="text-align: center;">L</p> <p>L 2:1 law 16:15 Lee 25:6,7 leg 9:8</p>	<p>legal 21:19 let's 12:7 letting 6:17 limit 13:9 line 5:4,7 25:18 litigation 12:18 12:22 13:3,7 17:14 18:2,22 19:4 20:6 21:7 21:21 LLC 1:3,6,9,12 LLP 3:6,15 4:5 28:8,9,10 long 10:18 longer 7:1 look 13:9,10 16:22 looked 12:13 looking 17:19 Loop 2:20 luck 10:17</p> <p style="text-align: center;">M</p> <p>M 4:4 28:8 Massachusetts 4:7 21:13 matter 19:5 mean 8:8,19 9:5 24:14 26:10 Medley 1:19 2:4 5:3,4,10,18 6:1 6:5,8,12 7:7,14 8:6,8 9:3 10:3 10:8,11,21 11:6,17 12:7 12:11 13:6,20 16:3 17:9 18:18 19:3 20:10,16,20 22:4,6 23:2,16 25:1,13,15,20 26:4,18 27:1,5</p>	<p>Melaugh 2:18 5:17,17,20 28:11 merits 14:14 Micallef 2:9 5:14 28:10 Minnesota 1:22 28:3,14,20 minutes 25:17 25:19 mistaken 10:5 Mm-hmm 8:6 16:3 Modi 3:13 6:10 28:7 morning 26:3,5 motion 6:14,20 7:12 8:17,17 10:22 11:1,4 11:10,22 12:17 13:5,17 14:6 14:10,18 15:4 15:4,9 17:3,7 19:17,18 24:13 25:4,8 move 11:18 Murphy 4:5 6:4 28:9 mute 5:9</p> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 4:1 5:1 N.W 2:11 3:16 Naveen 3:13 6:10 28:7 naveen.modi... 3:19 NCRA 1:21 28:2 necessarily 20:12</p>
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Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

A328

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

4

need 10:22 17:6 24:18 New 1:3,6,9,12 3:16 4:3 6:1,13 6:17,21 10:13 11:9 13:6,15 13:19 14:3,8 15:1,10 17:5 18:10 19:4,18 19:21 20:21 21:7,15 22:11 22:16 23:11 24:2,18 28:8 Non-Party 28:9 normal 7:2 Notary 1:21 28:3,20 note 28:5 number 13:13 15:21 20:13 25:6	once 19:22 ones 26:14 ongoing 17:14 18:22 21:20 opening 14:1 16:2 openings 14:2 oppose 11:3,22 15:7,10 17:4 opposing 11:5 opposition 12:6 oppositions 14:1 order 9:11 26:6 orders 20:15 originally 8:9 outcome 14:21 16:14 Owner 1:5,8,11 1:14	participate 18:8 24:5 particular 7:16 9:10 parties 6:21 7:1 7:3 11:7,8 13:10,11,11 15:21 18:22 22:22 23:6,10 28:12 partner 21:9 party 13:7 17:20 19:5 20:5 22:12 28:7,8 patent 1:1,2,4,5 1:7,8,10,11,13 1:14 2:3 10:1 12:18 13:3,11 20:6 22:19 patentability 16:18 patenter 13:22 patents 12:22 14:16 15:20 24:1,2,3,10 Pause 25:19 pending 23:22 24:20 periodic 15:17 personal 28:13 perspective 15:12 24:17 petition 9:6 17:21 24:22 petitioner 1:4,7 1:10,13 8:9 9:14 petitions 13:17 13:18 14:2,5 15:1,2 17:2,17 18:10,17 19:16 19:19,21 24:12	24:14,18 phone 2:1 please 21:7 25:17 point 6:20 14:17 14:19 15:8 17:4,12,16 23:5 24:11 25:2,5 points 22:9 23:19 25:7 policy 13:14 16:16 22:14,19 22:21 23:8,14 position 21:2 24:15 possible 21:18 22:3 post 20:10 practice 22:20 pre-institution 20:14 prejudice 23:18 23:19 24:21 premature 14:20 present 21:1 28:6 presented 9:16 presently 16:8 pretty 9:8 14:4 prevent 19:8 previously 9:16 primary 12:16 prior 8:22 9:15 17:13,20 24:3 probably 11:10 problem 24:14 26:2 proceeding 7:2 9:11 13:15 14:8,10,13	15:11,18 16:5 18:9,21 22:2 proceedings 1:19 6:14 14:15,19,22 15:5 16:9,10 16:21 17:5 18:9 21:17 22:12,16,17 23:7,11,13 25:9 26:12 28:4,4 Professional 1:20 28:2 proper 7:15 17:10,12 properly 8:10 provide 26:17 provisions 16:15 PTAB 24:8 PTO 16:10,12 public 1:21 13:13 16:16 22:13,19,21 23:8,14 28:3 28:20 pursuant 7:5 purviews 8:1 put 5:9
O	P			Q
O 2:1,1 5:1 object 11:22 obviate 17:6 Obviously 11:21 October 1:16 28:5,14 Office 1:1 9:16 10:1 14:15 16:8,16 22:20 okay 5:18 6:1,8 7:14 10:21 11:6,16,17 12:8,9 17:9 18:18,18 19:10 19:11 20:16,20 22:4 23:16 25:1,13,15,20 26:4,7,18 27:1 old 16:15	P 2:1,1,8 3:1,1 4:1,1 5:1 p.m 1:17 5:2 27:7 28:5,6 Palys 3:4 6:9,10 11:18,20,21 12:9 22:8 23:4 23:17 25:2,14 26:20 28:7 panel 6:13 17:1 18:13 20:3,4 25:20 panels 12:20 17:19 paper 25:6 part 19:4 partes 7:4 16:9 16:13,13 23:22 24:6 participants 2:1 22:15			quash 21:13 question 15:14 17:9,15 18:16 19:22 26:13 questions 26:7 26:19
				R
				R 2:1 3:1 4:1 5:1 raised 22:10 23:18

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

A329

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

5

rasher@sunst... 4:9 read 10:9 ready 11:4 really 8:1 23:11 reason 16:16 reasons 11:4 13:13,14 22:21 recall 13:16 recognize 19:3 record 5:19 14:4 28:4 recorded 1:19 reexamination 16:9,13 reexaminations 24:6 reexams 23:22 regard 17:8 regarding 22:19 24:9 regards 5:5 Registered 1:20 28:2 reject 9:13 related 28:11 relates 10:6 relative 13:18 18:16 relevance 21:16 relevant 16:20 26:16 reporter 1:21 5:7,8,11 26:2 28:1,2 represented 7:8 request 6:15,22 8:11 9:14 23:1 23:6 25:12 requesting 8:19 11:13 requests 21:11	21:14,20 22:15 reserve 12:9 reset 18:5 respect 10:4 responses 14:2 Reston 3:9 reverse 16:6 review 7:4 16:13 24:7 right 5:10 6:12 10:10,21 11:6 11:17 13:8,20 14:4 18:14 20:11 22:6,12 24:20 25:1 Robert 4:4 6:3 28:8 roll 5:12 Rule 9:17 <hr/> S S 2:1,1 3:1 4:1 5:1 Sally 1:18 2:4 saying 18:21 says 9:10 scenario 9:20 18:7 second 18:2,6 24:11 Secondly 21:6 section 17:17 see 12:19 21:1,4 seeing 8:22 12:16 seen 8:22 20:2 sense 17:6 18:3 sent 8:4,4 separate 20:9 set 18:5 settlement 6:15 7:8,9,10,17,22	8:3,14 22:21 23:3,15 seven 21:8 24:20 side 12:2 Sidley 2:10 5:13 28:10 similar 25:10 situation 6:18 7:15,21 16:22 18:1 situations 17:19 Siu 2:5 5:5 somewhat 15:13 17:22 18:14 soon 21:17 22:2 sorry 25:3 sounds 11:9 specifically 24:15 25:7 Square 3:7 stand 9:9 standing 21:1,5 standpoint 12:1 State 1:21 28:3 stated 12:20 statements 14:1 STATES 1:1 status 14:14 17:16 18:14 26:11,15 statute 7:5,15,16 9:1 10:2 19:14 stay 25:9 stenographica... 1:19 Stenotype 28:5 STEPHEN 2:5 Street 2:11 4:6 strong 22:21 23:8 subjected 21:8 21:10	subpoenaed 21:9,9,10 subpoenas 21:8 substantially 9:15 sued 17:20 18:1 suggest 22:20 Suite 2:11 Summer 4:6 Sunstein 4:5 6:3 28:8 supporting 13:1 supports 23:14 sure 12:12 15:16 19:13 <hr/> T take 5:12 9:13 13:1 21:2 25:21 taken 15:2 22:1 28:4 Teleconference 1:18 terminate 6:14 6:21,22 7:12 8:10,16,18 11:11 13:5 14:19 15:15 17:8 18:21 22:2,17 23:6 23:12 24:13 terminated 7:5 15:11 terminating 13:14 termination 8:5 12:13 13:1 14:8 15:8 18:12 19:9 20:2,5,8 22:22 23:15	Texas 15:19 16:7 Thank 6:5,12 11:20 12:10 20:20 22:8 25:14 27:1,4 thanks 26:22 27:3 thing 12:15 15:6 26:10 things 21:22 think 7:14 9:8 10:3,11,16 16:19 17:15 18:18 19:14 20:17 21:22 22:11,13,19 23:5,7,13,21 24:5,8 25:15 thinking 9:3 third 13:11 19:5 thought 18:19 Timbers 4:5 6:4 28:9 time 12:9 14:20 24:16 timely 21:3 timing 18:12 today 25:22 tomorrow 26:3 26:5 top 7:16 totally 21:17 TRADEMARK 1:1 transcribed 1:22 transcript 26:1 28:4 trial 1:2 2:3 12:14,15 15:12 15:21 17:4
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Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

A330

Patent Nos. 6,502,135, 7,490,151, 7,418,504, 7,921,211
Teleconference October 29, 2013

6

18:4 19:15,20 19:22 22:20 tried 10:15 true 7:19 28:4 try 9:7 19:13 trying 11:7 19:7 19:11 Tuesday 1:16 twice 18:1 two 3:7 11:7 15:20 20:9 23:10 26:6 typically 7:5	VIRENTX 1:5,8 1:11,14 Virginia 3:9 Virnetx 3:3 6:8 6:21 7:12 8:4 11:21 15:19 18:1,6 21:14 22:7,16 23:22 24:16 26:20 28:7 Virnetx's 12:2 26:13 voicing 12:5	withdrawal 17:5 wondering 12:4 Wonnell 1:20 5:9 28:2,19 Wood 2:10 words 10:13 work 11:7 wouldn't 9:6 11:22 16:19 18:21 wrap 16:22 writing 7:18 written 10:7,19	2017 28:21 20190-5675 3:9 202 2:13 3:18 203-2700 3:10 29 1:16 29th 28:5,14 3 3:00 1:17 28:5 3:27 27:7 28:6 30 9:12 300 21:11,11 31 9:12 28:21 315 10:2,5 17:17 315(b) 17:18 18:16 24:13,21 315(e) 10:6 317 7:6,15 8:16 325(d) 9:4,9 10:12 11:15 34 25:6 35 7:5 352(b) 9:21 376 5:6 377 5:6 378 5:6 4 408 2:22 408-4000 3:18 42.73 8:11 11:12 42.73(b) 9:18 443-9292 4:8 5 571 3:10 6 6,502,135 1:4 600 2:11 617 4:8 7	7,418,504 1:10 7,490,151 1:7 7,921,211 1:13 736-8000 2:13 8 835577 1:21 28:2 9 901 3:16 95014 2:21 974-0761 2:22
U U 2:1 U.S.C 7:6 ultimate 14:21 16:14 uncertain 17:16 18:14 understand 10:14 18:19 21:7 23:4 understands 6:13 understood 8:9 underway 15:18 UNITED 1:1 unopposed 11:1 11:12 unpatentable 14:17 16:8,12 updates 15:17 26:11	W wait 25:17 waiting 14:5 want 10:13,14 10:14 11:19 15:16 16:4 wanted 8:9 15:6 26:10 warranted 14:13 Washington 2:12 3:17 waste 14:20 way 8:16 10:9 We'll 26:18 we're 10:18 11:4 18:2,14 25:10 25:16,21 26:16 we've 12:12 14:10 15:17 16:1 20:2 21:10 26:12,14 week 16:2 weigh 20:4,12 willing 22:17 23:12 window 18:2 wish 7:1	X Y Yeah 9:22 10:6 year 17:20 Yokoyama 2:17 5:15,15,22 28:10 York 3:16 Z 0 02110-1618 4:7 1 1 2:20 11955 3:8 125 4:6 134 25:6 1501 2:11 2 2 25:19 2:00 5:2 20005 2:12 3:17 2013 1:16 25:6 28:5,14	2017 28:21 20190-5675 3:9 202 2:13 3:18 203-2700 3:10 29 1:16 29th 28:5,14 3 3:00 1:17 28:5 3:27 27:7 28:6 30 9:12 300 21:11,11 31 9:12 28:21 315 10:2,5 17:17 315(b) 17:18 18:16 24:13,21 315(e) 10:6 317 7:6,15 8:16 325(d) 9:4,9 10:12 11:15 34 25:6 35 7:5 352(b) 9:21 376 5:6 377 5:6 378 5:6 4 408 2:22 408-4000 3:18 42.73 8:11 11:12 42.73(b) 9:18 443-9292 4:8 5 571 3:10 6 6,502,135 1:4 600 2:11 617 4:8 7	7,418,504 1:10 7,490,151 1:7 7,921,211 1:13 736-8000 2:13 8 835577 1:21 28:2 9 901 3:16 95014 2:21 974-0761 2:22
V v 1:4,7,10,13 validity 24:10 variables 26:15 Vernetx 23:12 view 13:2 14:7 14:18 16:19				

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202-220-4158

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A331